

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
FEB 18 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA)	2 CA-CR 2008-0067
)	2 CA-CR 2008-0068
Appellee,)	(Consolidated)
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
HUMBERTO LOPEZ SEPULVEDA,)	Not for Publication
)	Rule 111, Rules of
Appellant.)	the Supreme Court
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20023421 and CR-20031587

Honorable Frank Dawley, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri

Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 In two separate cases, Sepulveda was convicted of one count each of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked and aggravated driving with a blood alcohol concentration (BAC) of .08 or more while his license was suspended or revoked. The court sentenced him to enhanced but mitigated, concurrent sentences on the four convictions, the longest of which is nine years' imprisonment.¹

¶2 On appeal, Sepulveda challenges the trial court's imposition of "discretionary attorney fees, a time payment fee, and an abatement fee" on the grounds that it failed to first evaluate his financial ability to pay and because he cannot afford them. These fees consist of a \$20 time payment fee, a \$250 DUI abatement assessment, attorney fees of \$400, and a surcharge of \$192.50 for each case. Sepulveda did not object to the imposition of any of these amounts at sentencing.²

¹Sepulveda was first convicted of these offenses in two separate jury trials in 2004. He appealed his convictions, arguing in both cases that the trial court had failed to determine whether he had been restored to competency before his trials. *See State v. Sepulveda (I)*, No. 2 CA-CR 2004-0385, ¶ 2 (memorandum decision filed April 4, 2006); *State v. Sepulveda (II)*, No. 2 CA-CR 2004-0388, ¶ 2 (memorandum decision filed April 4, 2006). After this court remanded both cases to the trial court for a retrospective competency determination, *see Sepulveda (I)*, No. 2 CA-CR 2004-0385, ¶ 8; *Sepulveda (II)*, No. 2 CA-CR 2004-0388, ¶ 7, the trial court set aside Sepulveda's convictions and sentences in both cases. The court subsequently found Sepulveda incompetent to stand trial and committed him to the Arizona State Hospital. Approximately six months later, the court found Sepulveda had been restored to competency and he was subsequently retried in both cases.

²Sepulveda was also assessed an additional \$500 in fines, but he does not challenge them. In addition, at Sepulveda's first set of arraignment hearings, the court assessed \$400 for attorney fees and a \$25 indigent assessment fee in each case. Without citing the record, Sepulveda states that his arraignment attorney did not object to these fees when they were imposed. Because the convictions and sentences from Sepulveda's first set of trials were set

¶3 In the absence of any objection below, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Id.*, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Accordingly, to obtain relief, Sepulveda must demonstrate not only that such error occurred but also that he was prejudiced by it. *See id.* ¶ 20.

¶4 A trial court may order a defendant to repay the costs of his legal defense. *See* A.R.S. § 11-584(B)(3) (a defendant may be required to “repay . . . a reasonable amount . . . for the cost of the defendant’s legal defense”); Ariz. R. Crim. P. 6.7(d) (explaining “[i]f in determining that a person is indigent under Rule 6.4(a), the court finds that such person has financial resources which enable him or her to offset in part the costs of the legal services to be provided, the court shall order him or her to pay” an amount towards these costs). A court may also impose fines and surcharges based on the offenses involved. *See* § 12-116.01 (penalty assessments); § 12-116.02 (same); § 28-1381(I) (setting forth fines and assessments for DUI); § 28-1383(J) (setting forth fines and assessments for aggravated DUI, including DUI abatement assessment).

¶5 Significantly, a number of these provisions either require or allow the court to take into account the defendant’s financial situation. *See* § 11-584(C) (when requiring

aside, it is unclear whether he continues to owe these fees in addition to the fees and costs that were imposed after his second set of trials. However, this issue does not affect our resolution of this appeal.

defendant to repay costs of legal defense, court “shall take into account the financial resources of the defendant and the nature of the burden that the payment will impose”); § 12-116.01(F) (allowing trial court to waive nonmandatory fines and all penalty assessments if court believes payment “would work a hardship on the persons convicted . . . or on their immediate families”); § 12-116.02(D) (same); Ariz. R. Crim. P. 6.7(d) (allowing court to impose costs of legal services on defendant in “such amount as it finds he or she is able to pay without incurring substantial hardship to himself or herself or to his or her family”).³

¶6 Sepulveda argues that under § 11-584(C) and Rule 6.7, before imposing fees for the legal services Sepulveda received, the trial court was required to consider the amount Sepulveda was able to pay without causing substantial hardship to him or his family. In fact, before the court imposes an assessment of attorney fees pursuant to § 11-584 and Rule 6.7(d), “the court is required to make specific factual findings that the defendant has the ability to pay the fees imposed and that the fees will not cause a substantial hardship.” *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 9, 185 P.3d 135, 139 (App. 2008). Here, the court erred in failing to make express findings regarding Sepulveda’s financial status. However, we have recently held that a court’s failure to do so when imposing attorney fees is not fundamental error. *See id.* ¶ 13. Moreover, Sepulveda has not produced any authority to suggest that the trial court was required to make express findings on his financial status before imposing other amounts that were not based on attorney fees, let alone that its failure

³The trial court is unable to waive the \$20 time payment fee. *See* § 12-116(A) (“A judge may not waive or suspend a time payment fee.”).

to do so would constitute fundamental error. *See Henderson*, 210 Ariz. 561, ¶¶ 22, 24, 115 P.3d at 608 (appellant has burden to show error and that error is fundamental).

¶7 Sepulveda contends, however, that fundamental error should be presumed because he lacked the resources to pay the fees imposed, citing *State v. Torres-Soto*, 187 Ariz. 144, 144-46, 927 P.2d 804, 804-06 (App. 1996) (court committed fundamental error in imposing \$85,500 in surcharges and \$375 in attorney fees in addition to \$150,000 mandatory fine on indigent defendant; record suggested court was unaware surcharges and attorney fees were waivable for hardship reasons). However, when the amounts involved are not “so egregious,” we will not find the trial court committed fundamental error. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 140 (finding no fundamental error where defendant was assessed only \$425 in attorney fees and assessments); *see also Torres-Soto*, 187 Ariz. at 145, 927 P.2d at 805 (explaining it would not find fundamental error solely for imposition of \$375 in attorney fees on indigent defendant were it not for fundamental error committed in imposing \$85,500 in waivable surcharges).

¶8 Here, Sepulveda was assessed a total of \$862.50 in fees and surcharges for each case. Accordingly, even assuming Sepulveda is indigent and lacks resources,⁴ these amounts are nowhere near the magnitude of the amounts for comparable fees at issue in *State v. Beltran*, 189 Ariz. 321, 322, 942 P.2d 480, 481 (App. 1997) (fundamental error where trial court imposed \$64,900 surcharge on “undisputably indigent” defendant; no

⁴The state argues we may affirm because there was sufficient evidence for the trial court to find Sepulveda had the ability to earn income as a plumber, landscaper, and mechanic. But because we have found no fundamental error, we need not reach this issue.

evidence court was aware surcharge could be waived for hardship reasons), and *Torres-Soto*, 187 Ariz. at 144-46, 927 P.2d at 804-06 (\$85,500 waivable surcharge and \$375 in attorney fees). Moreover, it appears the trial court failed to impose all of the mandatory fines that it was required to impose, let alone the discretionary surcharges that could have accompanied those mandatory fines. *See* § 28-1381 (fines and assessments for DUI); § 28-1383 (fines and assessments for aggravated DUI).⁵ Because the “overriding considerations” present in *Torres-Soto* and *Beltran* “are simply not present here,” *Moreno-Medrano*, 218 Ariz. 349, ¶ 15, 185 P.3d at 140, we decline to find the court committed fundamental error in imposing the fees and surcharges that Sepulveda now contests.

Disposition

¶9 For the reasons stated above, Sepulveda’s sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

⁵Absent a timely appeal or cross-appeal by the state seeking to correct this error, we are without jurisdiction to review this issue. *See State v. Dawson*, 164 Ariz. 278, 280-82, 792 P.2d 741, 743-45 (1990).